90-940

(1)

NO. 90-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

EMERY LEATHERS, Officer,
Petitioner,

v.

NATHAN MILLER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

IS THE STANDARD OF WIDE-RANGING DEFERENCE TO PRISON SECURITY MEASURES ESTABLISHED IN *WHITLEY V. ALBERS*, 475 U.S. 312 (1986), APPLICABLE, NOT ONLY TO THE QUELLING OF AN INSTITUTION-WIDE RIOT, BUT ALSO TO INSTANCES OF INDIVIDUAL INSURGENCY OR INSUBORDINATION?

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NO. 90-_____

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1990

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Emery Leathers, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 13, 1990.

OPINIONS BELOW

The opinion and judgment of the court of appeals is reported at 913 F.2d 1085 (4th Cir. 1990). (App. A at A-1). The prior order of the court of appeals allowing a Petition for Rehearing with Suggestion for Rehearing In Banc is reported at 893 F.2d 57 (4th Cir. 1989). (App. B at A-16). The prior panel opinion of the court of appeals is reported at 885 F.2d 151 (4th Cir. 1989). (App. C at A-18). The order of the district court is unreported. (App. D at A-31).

JURISDICTION

The opinion and judgment of the court of appeals was entered on September 13, 1990, and amended on October 12, 1990. (App. A-1, A-15). Petitioner believes that 28 U.S.C. § 1254(1) confers jurisdiction on the Court to review the September 13, 1990 judgment of the court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution and 42 U.S.C. § 1983.

U.S. Const. Amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of

Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

STATEMENT OF THE CASE

On February 9, 1987, Respondent, Nathan Miller (Miller), a convicted prisoner in the custody of the North Carolina Department of Correction, filed this action pursuant to 42 U.S.C. § 1983 against the Petitioner, Correctional Officer Emery Leathers (Leathers), alleging that excessive force had been used against him at Central Prison in Raleigh, North Carolina. On March 17, 1988, Leathers filed a motion for summary judgment supported by excerpts from his own deposition as well as from the depositions of Miller and three Correctional Officers. Additionally, Leathers filed affidavits from the custodian of Miller's medical records and the chief of diagnostic and classification services for the Division of Prisons of the North Carolina Department of Correction. The deposition testimony of Leathers and the three other Correctional Officers, together with the affidavits, showed substantially the following:

On January 7, 1987, Miller was an inmate in the custody of the North Carolina Department of Correction incarcerated at Central Prison in Raleigh, North Carolina, for armed robbery. At that time he was in close custody and on administrative segregation. Due to his demonstrated proclivity for violence and assaultive behavior he had been in that custody status since June of 1986. From March 1, 1978, to November 22, 1986, Miller amassed a total of 27 disciplinary infractions (prison rule violations), the majority of which manifested his proclivity for violence. (JA 263-65).[1] Leathers perceived Miller to be a troublemaker and

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1 "JA" refers to the Joint Appendix on file with the Fourth Circuit.

knew that Miller had been involved in at least one altercation. (JA 247-50).

On January 7, 1987, a Correctional Sergeant Walker (Walker) was on duty on the second floor of the maximum security building at Central Prison. (JA 88). Walker sorted inmate grievances for distribution by cellblock just by looking at the name of the inmate and the cell number on the grievance. Because Leathers was assigned to the east side of the second floor that day, Walker gave Leathers a grievance to be distributed to an inmate on the east side. Shortly thereafter, Leathers realized that the grievance was one which Miller had written on him. (JA 103-04, 110). Accordingly, Leathers proceeded to Miller's cellblock and delivered the form to Miller. (JA 53, 110-11). Leathers advised Miller to sign the grievance form and return it to Leathers; however, upon reading the response to the grievance Miller became angry and began directing obscenities toward Leathers, including the words "nigger" and "mother-fucker." Miller refused to sign the grievance form and continued to direct obscenities toward Leathers. Leathers again instructed Miller to sign the form and advised him that, if he was unhappy with it, he would need to see the Sergeant or Lieutenant. Miller eventually signed the form and gave it back to Leathers. (JA 111-12).

Leathers left Miller's cellblock, went to the cellblock control station manned by a Correctional Officer Jones (Jones), obtained a pair of handcuffs from Jones, reentered Miller's cellblock with the handcuffs, and returned to Miller's cell. (JA 52, 54-58, 112). Leathers told Miller to get dressed because he was going to see the Sergeant or the Lieutenant. Leathers handcuffed Miller, Miller's cell door opened, and Miller came out of his cell. (JA 112). Miller approached Leathers face to face such that Miller's saliva hit Leathers as Miller spoke. Leathers gave Miller direct orders to proceed toward the exit from the cellblock; however, Miller refused to obey and kicked Leathers' left leg.

Leathers again ordered Miller to proceed toward the cellblock exit. (JA 113-14, 121-24). Miller then moved toward the stairway, but stopped and began shouting at Leathers. (JA 58).

Finally, with his back toward the wall Miller proceeded down the stairway looking at Leathers and still directing obscenities toward him. At the bottom of the stairway Leathers tapped Miller in the back with his baton in order to direct him toward the cellblock exit. In response, Miller turned around and spat in Leathers' beard. Leathers wiped Miller's saliva from his beard and gave him a direct order to proceed toward the cellblock exit. (JA 114-15). Miller took three or four steps toward the cellblock exit, turned on Leathers, said "fuck you" to him, and pushed Leathers backwards with his hands. (JA 39-44, 63-65, 115, 131). In response, Leathers struck Miller about his arms with a baton two or three times. (JA 40-41, 64-65, 115).

Following this incident, Miller was taken for treatment to the Emergency Room of Central Prison Hospital. X-rays revealed that Miller's right forearm suffered a minor fracture approximately two centimeters long. Subsequent examinations revealed satisfactory healing of the fracture. (JA 251-60).

Excerpts from Miller's deposition testimony indicated his recollection of events as follows:

On January 3, 1987, Miller submitted an inmate GRIEVANCE FORM alleging that Leathers had insinuated to another inmate that Miller was a "snitch". (JA 230). On January 7, 1987, Leathers approached Miller's cell with the GRIEVANCE FORM Miller had previously submitted. (JA 137). Leathers placed the form on Miller's cell door, said "sign that", and walked further down the cellblock. (JA 139-40). The form indicated that an investigation disclosed the grievance had no merit and that Leathers had "conducted himself in a professional manner." (JA

230). Upon reviewing the form, Miller concluded it had not been properly processed. Accordingly, Miller called for Leathers, and Leathers came back to his cell. (JA 141-43). At that time Leathers said, "just sign the mother-fucking thing, punk." (JA 158-59).

Miller testified that he was "not able to control (himself) under just anything"; that when Leathers referred to him as a "punk" he "did get upset"; that being called a "punk" by Leathers, a black man, made him "prejudiced"; that when Leathers said, "just sign the mother-fucking thing, punk," Miller replied, "what?"; that Leathers then complied with Miller's request to repeat the statement; and, that Miller then said to Leathers, "Look, I ain't got to take this, you slush-headed nigger."[2](JA 146-47, 160-61).

Miller further testified that he "can't take cursing too good"; that he's "just not right" when he's cursed; that he's "very sensitive"; that cursing becomes an "excitement" for him; that after Leathers complied with his request to repeat the statement, Miller made the deliberate mental decision to "cuss (Leathers) out and force him to write (Miller) up." (JA 154, 163). Miller acknowledged that "being from the far South, (he) thought the

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5 North Carolina Administrative Code 2B .0302(38) provides that, should an inmate do the following, it constitutes a major disciplinary offense:

> Direct toward any state officials, any member of the prison staff, or any member of the general public, oral or written language or specific gestures or acts disruptive to the security and orderly operation of the unit/institution or management and control of inmates:
> (a) that are generally considered profane, vulgar, lewd, lascivious, or indecent in character, nature, or connotation, or
> (b) that are generally considered abusive, insolent, contemptuous, slanderous or otherwise defamatory, or
> (c) that threaten to inflict bodily harm to any person or physical injury to the properpty of any person;

best way for (him) to handle it was to curse (Leathers) as for his race," and that is what he proceeded to do. (JA 148). Miller testified that thereafter Miller "cussed out" Leathers and his whole family, that Leathers "cussed out" Miller and Miller's whole family, and that they exchanged threats. (JA 161, 164).

Finally, Leathers said to Miller, "I'm going to...go get the restraints and pull you out." Leathers then left the cellblock. (JA 170, 176). Approximately five minutes later Leathers returned to Miller's cell with a pair of handcuffs, a chain, and a riot baton. (JA 177). Leathers instructed Miller to insert his hands through the cell door, Miller did so, and Leathers placed handcuffs on him. (JA 179-80). Shortly thereafter, the cell door opened, Miller stepped out, and Leathers walked closely up to Miller. (JA 180-81). Miller's impression was that Leathers was going to hit him, so he said to Leathers, "go ahead, hit me."[3] Leathers ordered Miller to go downstairs, but Leathers was blocking Miller's path. Leathers then stepped aside and allowed Miller to pass. (JA 184-85).

At that time Miller walked to the top of the stairway and stopped. Leathers gave Miller an order to proceed down the stairs. Miller hesitated and then proceeded down the stairs, followed by Leathers. Near the bottom of the stairs, Miller was hit in the back with Leathers' baton. This contact was "not what one could really say (was) an assault." Miller reacted by looking toward Leathers to determine whether he was using the contact "as some instruction to go along." Miller then continued down the stairs. At the bottom of the stairs Miller was hit again in the

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3 Miller alleged in his Complaint that at this point he said to Leathers, "go ahead nigger." (JA 6).

back. Miller stopped and looked back at Leathers. At that point, Leathers told him to go ahead and pointed ahead. Accordingly, Miller began walking forward again. (JA 185-87, 200-02).

Subsequently, Leathers gave Miller another direct order to go forward, but a food cart pushed by a Correctional Officer Monk was in the exit doorway. (JA 202-03). At that time Leathers said that Miller was a "punk and wanted some dick." Miller then turned on Leathers saying, "yes, just like your mother." In the instant that Miller turned on Leathers, Leathers swung his baton at Miller, and Miller raised his hands to block the blow. The baton struck the chain between Miller's handcuffs. Miller "laughed at Mr. Leathers and told him his mama could hit harder than he was doing." Leathers then swung at Miller's handcuffed wrists two more times in rapid succession. (JA 209-17).

In response to Leathers' motion for summary judgment Miller filed an excerpt from Leathers' deposition and an excerpt from the North Carolina Administrative Code. (JA 244-50). 5 North Carolina Administrative Code 2F .1502(c)(5)(B) provides that "[w]henever correctional staff remove an individual inmate from a single cell due to the fact that this inmate is causing a disruption, a Sergeant (or someone in the chain of command above a Sergeant) will be present."[4] (JA 244).

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4 Leathers' action in removing Miller from his cell certainly did not constitute a knowing violation of this regulation. The uncontroverted deposition testimony of Walker was that, unless a Correctional Officer specifically "anticipates trouble", he has the discretion to remove an inmate from his cell by himself. (JA 104). Miller's own deposition testimony showed he was not actually disruptive at the time Leathers removed him from his cell. On the contrary, although they may have exchanged some words, Miller complied with Leathers' order to stick his hands out the cell door so that he could be handcuffed. (JA 178-80). Moreover, Leathers removed Miller from his cell for the specific purpose of

On May 6, 1988, the district court entered an order allowing summary judgment in favor of Petitioner. On September 12, 1989, a panel of the court of appeals (one judge dissenting) affirmed the judgment of the district court. On December 27, 1989, the court of appeals allowed the Respondent's Petition for Rehearing with Suggestion for Rehearing In Banc. On September 13, 1990, the court of appeals, by a six to four vote, vacated the judgment of the district court and remanded the case for further proceedings. On October 3, 1990, the court of appeals granted Petitioner's Motion for Stay of Mandate pending petition to this Court for writ of certiorari to the court of appeals. On October 12, 1990, the court of appeals amended its opinion.

REASONS FOR GRANTING THE WRIT

THE FOURTH CIRCUIT'S DECISION, BY FAILING TO ACCORD WIDE-RANGING DEFERENCE TO LEATHERS, NOT ONLY CONFLICTS WITH THE EIGHTH AMENDMENT STANDARD ESTABLISHED BY THIS COURT IN *WHITLEY v. ALBERS*, 475 U.S. 312 (1986), BUT ALSO WITH DECISIONS OF THE FIFTH AND ELEVENTH CIRCUITS.

A. THE FOURTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

In *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986), this Court held, in pertinent part, the following:

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escorting him to the higher authority which the regulation requires to be present when the inmate is actually "causing a disruption." (JA 112).

> "Prison administrators...should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." ***Bell v. Wolfish***, 441 U.S., at 547, 60 L.Ed.2d 447, 99 S.Ct. 1861. That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline. It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice.

Because this Court held that deference is to be accorded to both ends of the spectrum of prison security measures, it follows that such deference encompasses the entire spectrum; thus, such deference should logically also be triggered by disciplinary disturbances below the level of a full-scale prison riot. Manifestly, the six to four split in the in banc judgment of the Fourth Circuit indicates that a slim majority of that court does not adhere to this view. Although the majority specifically referenced and professed to apply some of the standards articulated in ***Whitley***, it gave no consideration whatsoever to the standard of wide-ranging deference to prison security measures. (App. A-3 to A-7). The dissenting judges castigated the majority for giving lip service to ***Whitley***, while in fact limiting its "standard's applicability to the quelling of prison riots." (App. A-8, A-11).

Not only did the majority fail to accord Leathers any deference whatsoever, but in evaluating the summary judgment record it employed a standard of review which had previously been superseded by rulings of this Court. Quoting from ***Charbonnages de France v. Smith***, 597 F.2d 406, 414 (4th Cir. 1979), the majority stated that the nonmoving "party is entitled 'to have the credibility of his evidence as forecast assumed, his version of

all that is in dispute accepted, [and] all internal conflicts in it resolved favorably to him.'" (App. A-3). Again, the dissenting judges castigated the majority for failing to employ the more demanding standard of review established by this Court in ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322-23 (1986), and ***Anderson v. Liberty Lobby***, 477 U.S. 242, 248-50 (1986). (App. A-13). As the dissenting judges stated, "[t]he majority's view of summary judgment...transformed the inevitable two sides of every prison argument into a jury question under § 1983 and deprived prison officials of Rule 56's ordinary purposes." (App. A-13).

Significantly, Miller's own deposition testimony showed that, although Leathers initially referred to Miller as a "punk", it was Miller who made a deliberate mental decision to formulate a massive retaliatory response grounded on race for the specific purpose of provoking Leathers. Miller's own deposition testimony disclosed that, upon making that decision, he called Leathers a "slush-headed nigger"; that they thereafter exchanged barrages of obscenities and threats; that immediately upon being taken out of his cell Miller taunted Leathers by saying "go ahead, hit me"; that upon reaching the exit from the cellblock Miller turned on Leathers as Miller leveled a sexual insult regarding Leathers' mother; that Miller's turning on Leathers under those circumstances could reasonably be perceived by Leathers as an attempt by Miller to consummate his earlier threats, whether or not Miller actually intended to do so; that it was at that instant that Leathers struck at Miller's handcuffed wrists once with a baton; that Miller mockingly responded to that contact by laughing at Leathers and telling "him his mama could hit harder than he was doing;" and, that Leathers then struck two more times at Miller's handcuffed wrists with the baton. Despite this evidence of a calculated challenge by Miller to Leathers' authority, the majority dismissed it as mere "[v]erbal provocation (which) alone does not justify a response such as occurred in this case." (App. A-7). As

the dissenting judges observed, however, it is essential to consider Miller's deliberate racial provocation of Leathers in order to properly apply the *Whitley* standards.

B. THE FOURTH CIRCUIT'S DECISION IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

As previously indicated, the logical extension of *Whitley* is that wide-ranging deference to prison security measures is also triggered by disciplinary disturbances below the level of a full-scale prison riot. Clearly, that is the approach taken by both the Fifth and Eleventh Circuits. *See Huguet v. Barnett*, 900 F.2d 838, 841 (5th Cir. 1990); *Bennett v. Parker*, 898 F.2d 1530, 1533 (11th Cir. 1990); *Ort v. White*, 813 F.2d 318, 322-24 (11th Cir. 1987); *Brown v. Smith*, 813 F.2d 1187, 1188-89 n.2 (11th Cir. 1987). In contrast, the Second Circuit has held that, although some of the *Whitley* standards are applicable in situations below the level of a full-scale prison riot, the standard of wide-ranging deference to prison security measures is not. *See Corselli v. Coughlin*, 842 F.2d 23, 26 (2d Cir. 1988).

Manifestly, the six to four split in the in banc judgment of the Fourth Circuit indicates that a slim majority of that court rejects the views of the Fifth and Eleventh Circuits and adheres, instead, to the Second Circuit view.

C. THE FOURTH CIRCUIT'S DECISION HAS IMPLICATIONS OF NATIONWIDE IMPORTANCE.

Finally, the position taken by the majority will adversely affect, not only prison systems, but also the courts. The dissenting judges, recognizing this prospect, stated the following:

> By discounting for purposes of summary judgment the significance of Miller's efforts to provoke a fight with Leathers, the majority tips the balance against the maintenance of institutional order. It issues a regrettable invitation to racial conflagration by signaling prisoners that they may freely barrage their guards with slurs and threats of violence, and then, in a no-lose proposition, sue them under § 1983 if the guards respond in even so much as a measured way. Few rulings more seriously jeopardize the stability of the prison environment.
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> * * *
>
> From this day forward, every altercation between prisoner and guard will provide the basis for a § 1983 suit which will invariably be allowed to go to the jury. Courts will become the new wardens whose job it now is to resolve the innumerable spats that may be expected to arise in any setting of confinement. Moreover, as a result of the majority's ruling, prison guards will be placed in an intolerable dilemma. If they fail to respond quickly and forcefuly to a reasonably perceived threat of violence, they risk bodily injury to themselves and others; if they do respond, however, they will undoubtedly find themselves defending a § 1983 suit before a jury.
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> * * *
>
> Section 1983 is a vital protection against the malicious use of force by guards against prison inmates. The majority, however, transforms it from a protection into a license -- a license to engage with impunity in calculated challenges to institutional authority. (App. A-10, A-11, A-14).

CONCLUSION

For the reasons stated, Petitioner believes the Fourth Circuit's decision conflicts, not only with this Court's decision in ***Whitley***, but also with decisions of the Fifth and Eleventh Circuits. This case presents an important federal question which has not

been, but should be, decided by this Court. Accordingly, the Court should issue the writ in order to settle the important federal question presented and to correct the court of appeals' decision.

Respectfully submitted,

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APPENDICES A - D

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No . 88-7651

NATHAN MILLER,

Plaintiff-Appellant,

versus

EMERY LEATHERS, Officer,

Defendant-Appellee,

and

NORTH CAROLINA PRISONER LEGAL SERVICES, INC.; CAROLINA LEGAL ASSISTANCE, INC.,

Amici Curiae.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Malcolm J. Howard, District Judge. (CA-87-85-CRT)

Argued: February 5, 1990 Decided: September 13, 1990

Before ERVIN, Chief Judge and RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, WILKINSON, and WILKINS, Circuit Judges.

Vacated and remanded by published opinion. Judge Hall wrote the majority opinion, in which Chief Judge Ervin, Judge Phillips, Judge Murnaghan, Judge Sprouse, and Judge Chapman joined. Judge Wilkinson wrote a dissenting opinion, in which Judge Russell, Judge Widener, and Judge Wilkins joined.

ARGUED: Steven H. Goldblatt, Director, Appellate Litigation Program, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Appellant. Howard Edwin Hill, Associate Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Dori K. Bernstein, Maureen F. Del Duca, Supervising Attorneys; David L. Engelhardt, Student Counsel, Appellate Litigation Program, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Appellant. Lacy H. Thornburg, Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee. Roger Manus, CAROLINA LEGAL ASSISTANCE, INC., Raleigh, North Carolina; Michael S. Hamden, NORTH CAROLINA PRISONER LEGAL SERVICES, INC., Raleigh, North Carolina, for Amici Curiae.

HALL, Circuit Judge:

Nathan Miller, a North Carolina inmate, brought this action pursuant to 42 U.S.C. § 1983 claiming that a state prison guard, Emery Leathers, used excessive force against him in violation of his Eighth Amendment rights. He appeals from the

district court's order granting Leathers' motion for summary judgment. We vacate the judgment of the district court and remand the case for further proceedings.

I.

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The facts and inferences to be drawn from the facts must be viewed in the light most favorable to the non-moving party, and this party is entitled "to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, [and] all internal conflicts in it resolved favorably to him." Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). Appellate review is de novo and, therefore, we are required to review the record under the same standards employed by the district court. Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1127-28 (4th Cir. 1987).

In order to succeed on his claim of excessive force, Miller must show that Leathers "inflicted unnecessary and wanton pain and suffering." Whitley v. Albers, 475 U.S. 312, 320 (1985). To determine whether the pain inflicted was unnecessary and wanton, a court should consider "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Whitley, 475 U.S. at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied 414 U.S. 1033 (1973). "'[S]uch factors as the need for application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted' are relevant to that ultimate determination." Whitley, 475 U.S. at 321 (citation omitted). With these principles in mind, we turn to the facts.

II.

On January 3, 1987, Miller filed a grievance with the prison administration complaining that Officer Leathers had told another inmate that he (Miller) was a "snitch." A correctional officer investigated the grievance by merely discussing it with Leathers, and the prison superintendent concluded that the "[i]nvestigation reveals that there is no merit to inmates [sic] complaint." Leathers brought a copy of the written decision to Miller's cell on January 7, 1987, to obtain his signature indicating that he had been served with it.

Upon reviewing the decision, Miller refused to sign it and a verbal confrontation ensued. Miller admits that he decided to verbally provoke Leathers in an attempt to get his grievances before higher authorities. He further alleges, however, that the threats and insults flowed both ways, and that at one point, Leathers threatened to "kick [Miller's] white ass." Miller eventually signed and returned the form, but Leathers nevertheless decided to bring him out of his cell "to see the sergeant or lieutenant." Leathers then removed Miller from his cell, handcuffed him, and began to escort him down the hall.

According to Miller, the verbal sparring continued as Leathers escorted Miller off the cellblock and down a flight of stairs; this trip was punctuated by several jabs from Leathers' riot baton to Miller's back. Upon reaching a doorway which he claims was blocked by a food cart, Miller refused to move forward. Turning around to face Leathers, Miller claims that Leathers insulted him and that he responded in kind. At this point, Miller says that Leathers raised his baton and that he (Miller) raised his handcuffed hands to ward off the impending blow. After he was

struck, he laughed at Leathers and was struck two more times. Miller also alleges that Leathers twice threatened to kill him during the incident. Miller claims that he reacted by pushing the officer away and picking up a broom handle to protect himself. With the aid of some nearby officers, Miller was eventually subdued. As a result of the blows from Leathers' baton, Miller sustained a fractured arm and swollen elbow.

The district court, upon consideration of the materials submitted by both parties pursuant to Leathers' motion for summary judgment, concluded that there was a need for the application of force, the amount of force was not disproportionate to the need, the injuries inflicted were de minimis, and the force used was applied in a good faith effort to discipline Miller and was both reasonable and justified on the basis of the facts then known to Leathers. The district court concluded that Miller had no basis for recovery and, accordingly, dismissed the action against Leathers. This appeal followed.

III.

On appeal, Miller contends that the evidence, when viewed most favorably to him, clearly gives rise to an issue of fact as to the necessity for the amount of force employed by Leathers. He argues that his version of the events supports his claim that Leathers either intended to injure him once they were off the cellblock or, alternatively, that Leathers used excessive force not in response to a threat by Miller, but rather as a reaction to verbal provocation. We agree.

Miller's version of the incident supports a reasonable inference that Leathers intended to provoke an incident so as to allow Leathers to beat him under the guise of maintaining order

or defending himself. The grievance filed by Miller indicates that Leathers may have harbored ill will against him.* Miller also points to a prison regulation that requires that the removal of a disruptive inmate from his cell may only be done in the presence of a sergeant or higher-ranking officer. Leathers' removal of Miller was apparently effected in violation of this regulation, and this undisputed fact further supports an inference that Leathers intended to retaliate against Miller.

The critical juncture in the sequence of events occurred at the doorway that Miller claimed was blocked. Unable to move forward as ordered, he was insulted by Leathers. Miller turned in the doorway and responded with a similarly provocative insult. It was at this point that Miller says Leathers raised his baton and he (Miller) reacted by raising his shackled hands to protect himself. The first blow brought a mocking insult from Miller, which in turn produced two more blows by Leathers.

Leathers characterizes Miller's actions in turning around in the doorway, while simultaneously directing a derogatory remark toward Leathers, as evincing "apparent offensive intentions." Leathers attempts to buttress his argument by pointing to Miller's history of violent behavior and by arguing that the blows inflicted were consistent with an attempt to defend himself rather than to injure Miller. While his arguments may eventually prevail at a later stage of the proceedings, they are inadequate to overcome the genuine issues of material fact raised by Miller's statements.

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* It is impossible to minimize the posible consequences to a prisoner of being labelled a "snitch." See Harmon v. Berry, 728 F.2d 1407, 1409 (11th Cir. 1984) (§ 1983 claim by inmate, alleging that prison officials endangered him by labelling him a "snitch," allowed to proceed past service of process stage).

Accepting Miller's version as true, we find that it supports a "reliable inference of wantonness in the infliction of pain." Brown v. Smith, 813 F.2d 1187, 1188 (11th Cir. 1987). Verbal provocation alone does not justify a response such as occurred in this case. and whether there was any more than verbal provocation by Miller is in genuine issue on any fair reading of this record. Moreover, we are unable to agree with the district court's characterization of Miller's injuries as de minimis. The outcome of the case depends on the resolution of certain factual disputes which will largely turn on judgments about credibility. These determinations must be made by the finder of fact. Accordingly, we vacate the judgment of the district court and remand the case for further proceedings.

VACATED AND REMANDED

WILKINSON, Circuit Judge, with whom Circuit Judges RUSSELL, WIDENER, and WILKINS join, dissenting:

Our nation's prisons, already racially charged, will become more so with this decision. The majority holds that an inmate can deliver racial taunts at a prison guard in an effort to provoke an altercation, and when the guard responds in a measured way, then sue him under § 1983. I am astounded that a § 1983 suit would lie for a prisoner who has engaged in a course of deliberate racial provocation, and I can only conclude that, despite the majority's invocation of Whitley v. Albers, 475 U.S. 312 (1986), its standard has effectively been confined to its factual setting of institution-wide disturbances. On both of these grounds, and for the reasons expressed in the superseded panel opinion, see 885 F.2d 151, I dissent.

I.

The majority holds that "verbal provocation" on the part of a prisoner is legally irrelevant for purposes of summary judgment. I disagree. I believe that it is not only appropriate, but essential, that an inmate's deliberate racial provocation of his guard be taken into account when assessing whether the force employed by the guard "'was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" Whitley, 475 U.S. at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

It is undisputed that Miller baited Officer Leathers with degrading racial epithets. The majority fails even to mention that Miller, who is white, admits calling Leathers a "slush-headed nigger" and threatening him with physical violence. In addition, Miller leveled sexual insults against Leathers' mother. Miller even conceded in his own deposition testimony that he made a deliberate decision to provoke Leathers so that Leathers would

write him up for a disciplinary infraction. Moreover, these taunts and threats were issued by a violent criminal who had many times over proven his willingness to back up his threats with action. Between March 1, 1978, and November 22, 1986, Miller had committed some twenty-seven disciplinary infractions, involving, among other things, possession of weapons, physical assaults, and threats of physical harm against numerous prison officials. In fact, it was because of Miller's past unruly conduct that he was in close custody and administrative segregation when Leathers left the grievance form with him and instructed him to sign it.

In the face of Miller's verbal assault accompanied by threats of physical violence, Leathers took no immediate action. It was only when Miller turned to face him -- a move that would be difficult to interpret as anything but confrontational -- that Leathers struck Miller with his baton three times about the arms and forced his retreat. Absent from the incident were the indicia of a retaliatory beating. Leathers did not strike Miller in the head, groin, or from behind, nor while prostrate; instead, he struck him in the obvious area of the body with which Miller appeared to be attacking Leathers, his raised handcuffed arms and fists. While it is true Leathers struck Miller three times, the three blows were necessary because Miller caught and blocked the first blow between his handcuffs, and then laughed and taunted Leathers, telling him "his mama could hit harder than he was doing" -- an indication that the first blow had not deterred Miller and that Miller sought to further provoke Leathers. It would be unrealistic to expect a more restrained response by Leathers to what can only

be considered a threat of violence. See Johnson, 481 F.2d at 1033 ("The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force.").*

The majority now rules that Miller's stream of slurs and threats of violence were mere "verbal provocation" and all but immaterial for purposes of summary judgment. I do not think Miller's taunting conduct can be dismissed so lightly. The abusive language used by Miller was of the most contemptible sort -- "fighting words" intended "by their very utterance [to] inflict injury or . . . to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572(1942). While endurance of a certain amount of verbal jousting is part of the profile of professionalism of any prison guard, the people behind the uniforms are still human beings. Prisons, moreover, are combustible settings, and prison order rests upon a fragile equilibrium. See Hudson v. Palmer, 468 U.S. 517, 526-27 (1984). By discounting for purposes of summary judgment the significance of Miller's efforts to provoke a fight with Leathers, the majority tips the balance against the maintenance of institutional order. It issues a regrettable invitation to racial conflagration by signaling prisoners that they may freely barrage their guards with slurs and threats of violence, and then, in a no-lose proposition, sue them under § 1983 if the guards respond in even so much as a measured

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* The majority makes much of the fact that Leathers may have acted in violation of a prison regulation by removing Miller from his cell outside the supervision of a higher authority to take him to see Leathers' superior. If such were the case, it would be a matter between Leathers and his supervisors, and would not be dispositive of the present action. Indeed, if violations of internal prison regulations were conclusive of § 1983 liability, prison authorities might either be reluctant to promulgate strict rules of conduct for prison guards or be prone to cover up infractions.

way. Few rulings more seriously jeopardize the stability of the prison environment.

II.

While professing to apply the "obduracy and wantonness" standard for cruel and unusual punishment in Whitley v. Albers, 475 U.S. 312 (1986), the majority in fact limits the standard's applicability to the quelling of prison riots. Such a departure from the Eighth Amendment standard is warranted neither under the language of Whitley nor the concerns expressed in that decision.

The Supreme Court in Whitley stressed the difficulties of maintaining discipline in the prison setting, emphasizing that these difficulties are exacerbated when defiant and disobedient prisoners threaten institutional order. "[I]n making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threats the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used." Id. at 320; see also Bell v. Wolfish, 441 U.S. 520, 547 (1979). Because prison officials often must immediately and emphatically defuse potentially explosive situations, courts should be "hesitant[t] to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." Whitley, 475 U.S. at 320.

In light of the dangers posed by defiant inmates and in recognition of the fact that unabated lawsuits against prison authorities are themselves no aid to prison discipline, the Whitley Court made the Eighth Amendment standard a difficult one to satisfy. For conduct to violate Eighth Amendment rights it "must involve more than ordinary lack of due care for the prisoner's interests or safety." Whitley, 475 U.S. at 319. The infliction of

pain is not cruel and unusual punishment "simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable." Id. "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." Id.

There is nothing whatsoever in Whitley to suggest that this standard is not applicable to instances of individual insurgency or insubordination. See Brown v. Smith, 813 F.2d 1187 (11th Cir. 1987). Indeed, one can readily imagine why the standard should apply. Defiance of prison rules may be contagious among inmates; testing the tolerances of guards may prove to be great sport. By reversing the grant of summary judgment here, the majority countenances conduct which hardly needs encouragement. It must do so, it explains, because "[t]he outcome of the case depends on the resolution of certain factual disputes which will largely turn on judgments about credibility." Maj. op. at 8. While it is no doubt true that the quarrel between Miller and Leathers, like any other, had two sides, not every disputed fact between an inmate and a guard is a material fact for purposes of summary judgment. Rather, "a prisoner may avoid . . . summary judgment . . . only if the evidence viewed in the light most favorable to him goes beyond a mere dispute over the reasonableness of the force used and will support a reliable inference of wantonness in the infliction of pain." Brown, 813 F.2d at 1188.

The Whitley Court indicated that obduracy and wantonness have not been demonstrated, and a § 1983 suit should not go forward, unless the prisoner who has allegedly been wronged can make "a showing that there was no plausible basis for the officials' belief that this degree of force was necessary." Whitley, 475 U.S. at 323. Here, Miller is incapable of making such a showing. In light of Miller's abusive language, his threats of violence, and his turning on Leathers in direct defiance of an order to move forward,

it was not just plausible, but entirely reasonable, that Leathers believed the force he applied to be necessary to protect himself. To hold, as the majority does, that there is a genuine issue of disputed fact on this record is to "effectively collapse[] the distinction between mere negligence and wanton conduct . . . implicit in the Eighth Amendment." Id. at 322. The result of the majority's holding is to leave the Whitley standard intact only in the context of prison riots, and to substitute a negligence standard in all other contexts.

Moreover, the majority compounds its error by relying on a statement of the standard for summary judgment which not only predates the Supreme Court's recent pronouncements on the subject, see Celotex Corp. v. Catrett, 477 U.S. 317 (1986), but also affords prison officials little legal protection against a spate of prison altercation suits. Quoting from Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979), the majority states that the nonmoving party "is entitled 'to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, [and] all internal conflicts in it resolved favorably to him.'" Maj. op. at 3. The Supreme Court has recently made clear, however, that the burden on the responding party is considerably more exacting. In Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the Court stated that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted). Under this standard, it is even more plain that summary judgment was warranted because Miller failed to make the required showing that there was "no plausible basis" for Leathers to believe his use of force was necessary. Whitley, 475 U.S. at 323. The majority's view of summary judgment has transformed the inevitable two sides of every prison argument into a jury question under § 1983 and deprived prison officials of Rule 56's ordinary purposes.

In addition to being in error as a matter of law, the majority's position is disastrous as a matter of prison policy. From this day forward, every altercation between prisoner and guard will provide the basis for a § 1983 suit which will invariably be allowed to go to the jury. Courts will become the new wardens whose job it now is to resolve the innumerable spats that may be expected to arise in any setting of confinement. Moreover, as a result of the majority's ruling, prison guards will be placed in an intolerable dilemma. If they fail to respond quickly and forcefully to a reasonably perceived threat of violence, they risk bodily injury to themselves and others; if they do respond, however, they will undoubtedly find themselves defending a § 1983 suit before a jury.

III.

I recognize, of course, that the danger to institutional order is a double-edged sword in that the wanton use of force in violation of Eighth Amendment safeguards may itself be an impediment to institutional peace. Section 1983 is a vital protection against the malicious use of force by guards against prison inmates. The majority, however, transforms it from a protection into a license -- a license for inmates to engage with impunity in calculated challenges to institutional authority.

I respectfully dissent.

Filed: October 12, 1990

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-7651
(CA-87-85-CRT)

Nathan Miller,

Plaintiff - Appellant,

versus

Emery Leathers,

Defendant - Appellee.

ORDER

The Court amends its opinion filed September 13, 1990, as follows:

On page 4, first paragraph, line 5 -- a comma is inserted after the phrase "cert. denied."

For the Court - By Direction

/s/ John M. Greacen
CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 88-7651

NATHAN MILLER

Plaintiff - Appellant

v.

EMERY LEATHERS, Officer

Defendant - Appellee

and

Carolina Legal Assistance, Inc.;
North Carolina Prisoner Legal Services, Inc.,

Amici Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to the Court. A majority of judges having voted in a requested poll of the Court to grant rehearing in banc,

IT IS ORDERED that the rehearing in banc is granted.

IT IS FURTHER ORDERED that this case shall be calendared for argument at the February session of Court. Within ten days of the date of this order nine additional copies of appellant's briefs and four additional copies of appellees briefs shall be filed and the appellant will file nine additional copies of the joint appendix. Twelve copies of the amici curiae's joint brief shall be filed in the office of the Clerk on or before January 10, 1990. A reply brief, if any, shall be filed in the office of the Clerk on or before January 24, 1990.

For the Court,

John M. Greacen
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-7651

NATHAN MILLER,

Plaintiff - Appellant,

versus

EMERY LEATHERS, Officer

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Malcolm J. Howard, District Judge. (CA-87-85-CRT).

Argued: June 8, 1989 Decided: September 12, 1989

Before HALL, WILKINSON, and WILKINS, Circuit Judges.

Philip Azar, Student Counsel (Steven H. Goldblatt, Director; Dori K. Bernstein, Maureen F. Del Duca, Supervising Attorneys; David L. Engelhardt, Student Counsel, APPELLATE LITIGATION PROGRAM, Georgetown University Law Center on brief) for Appellant. Howard Edwin Hill,

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Associate Attorney General (Lacy H. Thornburg, Attorney General on brief) for Appellee.

WILKINSON, Circuit Judge:

Here we must determine if the district court erred in granting summary judgment to a defendant prison guard whom the plaintiff inmate alleged had used excessive force against him in violation of his constitutional rights. We find that the grant of summary judgment was proper and affirm.

I.

Appellant Nathan Miller is incarcerated at Central Prison in Raleigh, North Carolina, for armed robbery. On January 3, 1987, Miller filed a grievance against Officer Emery Leathers to resolve various ongoing difficulties with him. On January 7, 1987, the prison superintendent, after reviewing the grievance, decided in Leathers' favor, finding that Leathers had conducted himself "in a professional manner" when dealing with Miller and other inmates.

Later that day, Leathers was instructed to deliver a grievance form to appellant, on which the superintendent had noted his decision. Appellant had demonstrated a proclivity for violence and assaultive behavior. Between March 1, 1978 and November 22, 1986, he had committed some twenty-seven disciplinary infractions involving, among other things, possession of weapons, physical assaults, and threats of physical harm against numerous prison officials. Appellant was thus in close custody and administrative segregation when Leathers left the form with him and instructed him to sign it.

Miller claimed Leathers delivered the form "with a very nasty attitude." Miller refused to sign the form, and a brief verbal confrontation ensued between the parties. During this time,

Miller, who is white, referred to Leathers as a "slush-headed nigger" and threatened him with physical harm. Finally, Miller signed the form and returned it to Leathers. Leathers then left the cellblock and proceeded to the cellblock control station where he obtained a pair of handcuffs. He then reentered appellant's cellblock and returned to appellant's cell.

Upon returning to appellant's cell, Leathers claimed he told Miller to get dressed because he was taking him to see the Sergeant or the Lieutenant. Leathers handcuffed Miller and directed the officer in the control booth to open his cell door. When the door opened, the parties moved toward one another so that they were face to face, virtually touching. At this point, Miller concedes he again threatened Leathers with physical harm and repeated his racial taunts. Leathers contends Miller also refused orders, kicked him in the ankle, and spit in his beard, but this is a matter of dispute. Leathers then instructed appellant to proceed toward the cellblock exit. After proceeding downstairs, Leathers directed Miller toward the exit. Appellant moved forward several steps and then refused to proceed any further. At that point, Miller contends that Leathers said he was a "punk and wanted some dick." Miller concedes he then turned to face Leathers, responding "yes, just like your mama." A brief scuffle ensued and Leathers struck appellant with his baton three times. Appellant caught and blocked the first blow between his handcuffs, but the other blows struck him on the arms. Appellant then armed himself with a broomstick from a nearby mop closet and charged Leathers. Leathers and other officers subdued him and he was escorted to the Emergency Room of Central Prison Hospital.

At the infirmary, Miller was examined by Physicians' Assistant Ray Drewry. X-rays revealed that appellant's right forearm had suffered a minor fracture approximately two centimeters long. A short arm cast was applied on January 12, 1987,

and removed on March 16, 1987. X-rays showed satisfactory healing.

On February 9, 1987, appellant filed a complaint pursuant to 42 U.S.C. § 1983, alleging that on January 7, 1987, defendant had used excessive force against him in violation of his constitutional rights. On March 17, 1988, Leathers filed motions to dismiss and for summary judgment. On May 6, 1987, the district court granted Leathers' motion for summary judgment concluding that appellant failed to allege sufficient evidence to meet the test for excessive force. Specifically, the court found that there "was a need for application of force, that the amount of force employed was not disproportional to the need, and that the injury inflicted upon plaintiff was de minimis." The district court concluded that "the force was applied in a good faith effort to discipline" Miller. This appeal followed.

II.

Miller argues that the question of whether Officer Leathers used excessive force against him presents an issue of triable fact. We believe, however, that the applicable Supreme Court precedents reflect a recognition that confrontations between guards and inmates in the prison setting are legion, and that every altercation with two sides to it does not render judgment inappropriate as a matter of law.

It is clear that "the unjustified striking, beating, or infliction of bodily harm upon a prisoner by the police or a correctional officer gives rise to liability under 42 U.S.C. § 1983." King v. Blankenship, 636 F.2d 70, 72 (4th Cir. 1980). Section 1983, however, "is not itself a source of substantive rights." Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979). Rather, it provides "a method of vindicating federal rights elsewhere conferred." Id. Thus, "[i]n addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional

right allegedly infringed by the challenged application of force." Graham v. Connor, 109 S.Ct. 1865, 1870 (1989). In most cases, either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments is implicated. Id. Here, since the incident took place after appellant's conviction, the Eighth Amendment "serves as the . . . source of substantive protection." Whitley v. Albers, 475 U.S. 312, 318, 327 (1986). While the particular setting of Whitley involved a prison riot, the standard announced in that case is not limited to the quelling of institutional disturbances. The Whitley standard applies to any "claim of excessive force to subdue [a] convicted prisoner," Graham, 109 S. Ct. at 1871, or to "prophylactic or preventive measures intended to reduce the incidence of . . . any other breaches of prison discipline." Whitley, 415 U.S. at 322. See also Bell v. Wolfish, 441 U.S. 520, 547 (1979).

Recognizing that a plethora of lawsuits against prison authorities might itself be inimical to prison discipline, the Supreme Court made the Eighth Amendment standard a difficult one to satisfy. For conduct to be a violation of Eighth Amendment rights, it "must involve more than ordinary lack of due care for the prisoner's interests or safety." Whitley, 415 U.S. at 319. The infliction of pain is not cruel and unusual punishment "simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable." Id. "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." Id. In determining whether force was used merely to inflict unnecessary and wanton pain, "'such factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted'" must be considered. Id. at 321, quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

Here, Leathers' use of force did not transgress Eighth Amendment standards. Leathers knew that appellant had a proclivity for violence. Moreover, moments prior to the incident, Miller had directed a racial insult at Leathers, calling him a "slush-headed nigger," and had threatened Leathers with physical harm. Miller concedes in his own deposition testimony that he made a deliberate decision to provoke Leathers so that Leathers would write him up for a disciplinary infraction. When appellant refused to obey Leathers' instruction to proceed through the cellblock exit, and turned around to confront him, while sexually insulting Leathers' mother, Officer Leathers "reasonably perceived" that he was being threatened with bodily harm. Whitley, 475 U.S. at 321. To have reacted by striking appellant three times was not wanton or unnecessary in this context.

Miller's contention that Leathers used force maliciously and wantonly because appellant had filed a grievance against him is without merit. The grievance proceeding was one in which Leathers had prevailed. Absent from the incident also are the more obvious indicia of a retaliatory beating. Leathers did not strike Miller in the head, groin, or from behind, nor while he was prostrate. He struck a defiant and disobedient inmate who had previously threatened him and who had turned on him in a manner indicative of an intent to carry out those threats. He struck appellant in the obvious area of the body he would use in an attack upon Leathers, his handcuffed arms and fists. It is true Leathers struck Miller three times. The three blows were necessary, however, because Miller caught and blocked the first blow between his handcuffs, and then laughed and taunted Leathers, telling him "his mama could hit harder than he was doing" -- an indication that the first blow was not harmful and had not deterred appellant.

Miller contends in his brief that Leathers acted in violation of prison regulations by removing Miller from his cell outside the supervision of a higher authority. If such is the case, it is a matter between Leathers and his supervisors. It is not dispositive, however, of the present action. Indeed, if violations of internal prison regulations were conclusive of § 1983 liability, prison authorities might either be reluctant to promulgate strict rules of conduct for prison guards or be prone to cover up infractions.

We do not adopt a rule that sufficient verbal provocation will permit a prison guard to avoid § 1983 liability for the use of wanton and malicious force. We recognize, moreover, that prison vernacular is often coarse and that this quarrel, like any other, has two sides. The ill feeling between guard and inmate was considerable; their dealings were never marked by courtesy on either side. Every disputed fact between altercants is not a material fact for purposes of summary judgment, however. In the summary judgment context, it is not the judge's function "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Ballinger v. North Carolina Agricultural Extension Service, 815 F.2d 1001, 1004-05 (4th Cir. 1987). Thus, appellant could have survived summary judgment here "only if the evidence viewed in the light most favorable to him [went] beyond a mere dispute over the reasonableness of the force used and . . . support[ed] a reliable inference of the wantonness in the infliction of pain." Brown v. Smith, 813 F.2d 1187, 1188 (11th Cir. 1987).

Here the evidence did not. Section 1983 does not displace all adjudicative authority on the part of prison officials or compel courts to umpire every altercation behind prison walls. "[M]anagement by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may

require and justify the occasional use of a degree of intentional force." Johnson, 481 F.2d at 1033. The threat to prison authority here was apparent. Not content with the outcome of the grievance process, Miller admits, both in his complaint and in his brief before this court, that he threatened Leathers with physical harm, directed racial insults at him, and cast sexual aspersions on his mother. By his own admission, he embarked on a deliberate course of conduct designed to provoke Leathers into writing him up, or, perhaps, into an incident for which legal action might lie. Further, he turned on Leathers at the exit to the cellblock in direct defiance of an order to proceed. In such circumstances, some deference must be accorded prison guards forced to choose between the risks of becoming defendants in a § 1983 action and of sustaining bodily injury themselves. While restraint in the face of provocation may still have remained the course of wisdom, we cannot say that the measured force employed on Miller's handcuffed wrists was of a wanton and obdurate kind.

The judgment of the district court is

AFFIRMED.

HALL, Circuit Judge, dissenting:

I dissent from the majority's decision because I believe that the record below, when viewed in the light most favorable to Miller, shows the existence of a genuine issue of material fact sufficient to withstand the motion for summary judgment. Miller's version of the events surrounding the infliction of his injuries differs in several significant respects from that recounted in the majority's opinion, and a comparison between the two serves to illuminate why this case should have been permitted to proceed further.

I.

We are not confronted with a judgment reached after a trial in which the credibility of the witnesses could be judged by the trier of fact. Instead, this appeal involves only the pleadings, deposition testimony and various exhibits. Our review is de novo and, therefore, we are constrained to review the record under the same standards employed by the lower court. Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1127-28 (4th Cir. 1987). The majority baldly asserts that Leathers "reasonably perceived" that he was being threatened with bodily harm and that his actions were justifiable.[1] The selective assembly of facts and allegations

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1 The majority applies the standard announced in Whitley v. Albers, 475 U.S. 312 (1986), to the facts of this case. In Whitley, a five-member majority held that, in the cotext of a prison riot, the established Eighth Amendment standard of "the infliction of unnecessary and wanton pain" turned on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm." Id. at 320. Whether a malicious and sadistic intent is a prerequisite to an Eighth Amendment violation in other contexts is still an open question. Id. at 328, Marshall, J., dissenting; see also Morgan v. District of Columbia, 824 F.2.d 109, 1057 (D.C. Cir. 1987) (an express intent to inflict suffering is never required to prove an Eighth Amendment violation). Because I believe that Miller's claim should survive

supporting the majority's conclusion ignores the long-established standard for evaluating summary judgment motions: the facts and inferences to be drawn from the facts must be viewed in the light most favorable to Miller, and he is entitled "to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, [and] all internal conflicts in it resolved favorably to him." Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). I will analyze the record accordingly.

II.

On January 3, 1987, Miller filed a grievance with the prison administration complaining that Officer Leathers had told another inmate that he (Miller) was a "snitch." A correctional officer investigated the grievance by merely discussing it with Leathers and came to the conclusion that the "investigation reveals that there is no merit to inmate's complaint." If the truth of Miller's grievance is assumed, and there is nothing in the record beyond the investigator's "finding" to rebut it, then there is an ample basis to support an inference that Leathers harbored a pre-existing hostility towards Miller. Although the majority characterizes the grievance as an attempt "to resolve ongoing difficulties with [Leathers]," it is impossible to minimize the possible consequences of being labelled a "snitch." See Harmon v. Berry, 728 F.2d 1407, 1409 (11th Cir. 1984) (§ 1983 claim by inmate, alleging that prison officials endangered him by labelling him a "snitch," allowed to proceed past service of process stage). It was this grievance form, with the investigator's finding of "no merit," that Leathers brought to Miller's cell on January 7, 1987.

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summary judgment under even this heightened standard, it is unnecessary to discuss the issue further.

Upon receiving the form, Miller refused to sign it and a verbal confrontation ensued. Miller admits that he decided to verbally provoke Leathers in an attempt to get his grievances before higher authorities; however, he alleges that the threats and insults flowed both ways and that at one point, Leathers threatened to "kick [Miller's] white ass." Miller eventually signed and returned the form, but Leathers nevertheless decided to bring him out of his cell "to see the sergeant or lieutenant." Leathers then removed Miller from his cell, handcuffed him and began to escort him down the hall.[2]

According to Miller, the verbal sparring continued as Leathers escorted Miller off the cellblock and down a flight of stairs; this trip was punctuated by several blows from Leathers' riot baton to Miller's back. Upon reaching a doorway which Miller claims was blocked by a food cart, he refused to move forward. Turning toward Leathers, Miller claims that Leathers insulted him and that he responded in kind. At this point, Leathers raised his baton and Miller raised his handcuffed hands to ward off the impending blow. He was struck, laughed at Leathers and was struck twice more. Miller also alleges that Leathers twice threatened to kill him during the incident. Miller sustained a fractured arm and a swollen elbow. Miller reacted by pushing the

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Prison regulations require that the removal of a disruptive inmate from his cell shall only be accomplished in the presence of a sergeant or higher-ranking officer. Miller contends that this regulation was violated when Miller was taken from his cell on January 7. The prison regulation's requirement of an officer's presence during removal of a disruptive inmate is arguably a response to the need to protect against the type of abuse complained of by Miller and, on the other side of the coin, as a precautionary measure to bolster the evidence against false allegations of abuse by staff. It is not unreasonable to infer, as Miller contends, that his removal from the cell in handcuffs was the initial step in Leathers' plan to harm Miller out of the sight and sound of other inmates or higher-ranking officers.

officer away and picking up a broom handle to protect himself. With the aid of some nearby officers, Miller was eventually subdued.

The district court, upon consideration of the materials submitted by both parties pursuant to Leathers' motion for summary judgment, concluded that there was a need for the application of force, that the amount of force was not disproportionate to the need, that the injuries inflicted were de minimis, and that the force used was applied in a good faith effort to discipline Miller and was both reasonable and justified on the basis of the facts then known to Leathers. Thus, the district court concluded that Miller had no basis for recovery, and the majority agrees. I do not.

III.

The majority bases its finding that there was a need for force on the following: Miller's history of violence within the prison, his insults towards Leathers, his admitted plan to provoke Leathers in order to be written up, his refusal to obey Leathers' command to proceed through the doorway, and his act of turning around and insulting Leathers' mother. However, Miller's allegations directly contradict the majority's conclusion that Miller "turned on [Leathers] in a manner indicative of an intent to carry out [his] threats." Slip Op. 7. If Miller's version of the facts is to be believed, as it must at this point, he makes more than a colorable claim that Leathers intended to provoke an incident in which he would be able to injure Miller under the guise of protecting himself. Miller's allegations also support a view that, unable to proceed through the doorway, he turned only to respond to Leathers' latest salvo in their ongoing battle of insults and that Leathers reacted to the insult, not to any threat.

The majority's recitation of the facts do not capture the flavor of the incident conveyed by Miller's deposition testimony. According to Miller, the insults and coarse language flowed both

ways from the outset, and Miller's fear of being harmed first arose when he was ordered to come out of his cell and be handcuffed. He characterized the jabs to his back as an attempt by Leathers to "start something." Most critically, Miller alleges that he raised his shackled limbs only to defend himself from the impending blow from Leathers' baton. Nothing in Miller's testimony evinces an intent to confront Leathers or to threaten him with physical harm at that juncture, and he raises at least a reasonable inference that his injuries were wantonly and unnecessarily inflicted. This is sufficient to create a genuine issue of material fact, i.e., whether Leathers had a reasonable basis to exert the force he did.

I am sympathetic to the policy concerns noted by the majority. Prisons are places of unrelenting tension between guards and the guarded. Correctional officers must contend with the most intractable members of society, and their compensation for performing this unenviable but essential task is often woefully inadequate. Nevertheless, I am compelled to dissent because I believe, under the established standard of review, that Miller's case should not have been disposed of by summary judgment on the existing record. The fact that the Eighth Amendment standard of liability is a difficult one to satisfy does not justify a diminished adherence to the standard for determining summary judgment motions.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 87-85-CRT

NATHAN MILLER,

Plaintiff,

v. ORDER

OFFICER EMERY LEATHERS,

Defendant.

This matter is before the court on motions by defendant to dismiss this action pursuant to Rule 12 of the Federal Rules of Civil Procedure and for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Since defendant relies on affidavits attached to the motions, the court is treating the same as a motion for summary judgment to which plaintiff has properly responded through his counsel. The matter is now ripe for disposition.

In this 42 U.S.C. § 1983 action, plaintiff claims defendant, Emery Leathers, a guard employed by the North Carolina Department of Corrections, used excessive force against plaintiff in violation of his constitutional rights. Plaintiff seeks unspecified compensatory and punitive damages.

The test for excessive use of force is as follows:

> A court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm.

Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) cert. denied sub nom John v. Johnson, 414 U.S. 1033 (1973).

This test was approved by the Fourth Circuit Court of Appeals in King v. Blankenship, where the court held that "the unjustified ... infliction of bodily harm upon a prisoner gives rise to liability under 42 U.S.C. § 1983 on the part of one who, acting under color of state law, engages in such conduct without just cause." 636 F.2d 70, 72 (1980).

The United States Supreme Court approved the Glick factors in Whitley v. Albers, where the Court emphasized that

> It is the obduracy and wantonness, not inadvertance or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs or restoring official control over a tumultuous cell block. The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was reasonable, and hence unnecessary in the strict sense.

475 U.S. 312, 319 (1986).

The Albers decision held that from the Glick factors "inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." Id. at 321. The Court found "equally relevant ... such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them and any efforts made to temper the severity of a forceful response." Id.

The plaintiff has failed to allege facts sufficient to meet the test for excessive use of force enunciated in Glick and approved by the Supreme Court in Albers. A careful and detailed review of the motions, affidavits and other material filed in this matter has satisfied the court that there was a need for the application of force, that the amount of force employed was not disproportional to the need, and that the injury inflicted upon plaintiff was de minimus. This court is also satisfied that the force was applied in a good faith effort to discipline the plaintiff which was both reasonable and justified on the basis of the facts known to the defendant at the time of the incident. The applicable law reveals that the plaintiff has no basis for recovery.

For the foregoing reasons, the defendants' motion for summary judgment is granted and this case is dismissed.

This 5th day of May, 1988.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

ORIGINAL

No. 90-940

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

EMERY LEATHERS, OFFICER,
Petitioner,

v.

NATHAN MILLER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE COURT BELOW APPLIED APPROPRIATE STANDARDS WHEN IT DETERMINED THAT PETITIONER WAS NOT ENTITLED TO SUMMARY JUDGMENT UNDER RULE 56?

2. WHETHER THE COURT BELOW, IN ASSESSING RESPONDENT'S EIGHTH AMENDMENT CLAIM, PROPERLY APPLIED THE STANDARD ANNOUNCED BY THIS COURT IN WHITLEY V. ALBERS WHICH REQUIRES A SHOWING THAT FORCE WAS EMPLOYED "MALICIOUSLY AND SADISTICALLY" FOR THE EXPRESS PURPOSE OF INFLICTING PAIN?

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STATEMENT OF THE CASE

Respondent, Nathan Miller, an inmate at Central Prison in Raleigh, North Carolina, filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of North Carolina against petitioner, Officer Emery Leathers, a guard at the prison, alleging violations of his rights. (JA 3-9).[1] Miller alleged an excessive use of force by Leathers during an incident that occurred in the prison on January 7, 1987. (JA 4).

The district court entered an order granting petitioner summary judgment pursuant to Fed. R. Civ. P. 56 (Rule 56). Pet. App. at A-31-33. On appeal, a divided panel of the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court. Pet. App. at A-18-30. The court of appeals granted a petition for rehearing en banc, Pet. App. at A-16-17, and vacated the district court's judgment by a six to four vote. Pet. App. at A-1-14.

The events alleged by Miller in his complaint and supported by his depositions and affidavits are as follows:[2]

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[1] "JA" refers to the Joint Appendix filed with the Fourth Circuit.

[2] Miller's version is disputed by petitioner. Since the issue at the summary judgment stage is whether respondent has presented genuine issues of material fact which should be resolved by a jury, we do not recount petitioner's version of the events. Petitioner's version is restated in his petition. Pet. at 3-5.

On January 3, 1987, plaintiff Miller filed a Grievance Form against Leathers, alleging that Leathers told another inmate that Miller was a "snitch". (JA 230). Miller had hoped to use the prison's grievance procedure to resolve his ongoing difficulties with Leathers. (JA 145). The superintendent of the prison resolved the grievance in Leathers' favor. (JA 230).

On January 7, Leathers delivered the resolved grievance form "with a very nasty attitude" to Miller's cell and told him to sign it. (JA 4). They exchanged obscenities before Miller gave Leathers the signed grievance form, noting his appeal of the superintendent's decision. (JA 5, 147-153, 167-168). Leathers left the cell, promising to return to "kick [Miller's] ass". (JA 149-150). Leathers told Miller, "I'm going to pull you out. I'm going to go get the cuffs--go get the restraints, and pull you out." (JA 170).

Leathers returned and told Miller, "Stick your hands out the door and let me put these cuffs on you." (JA 178). Miller responded, "Why? I don't have an appointment anywhere. You have no reason to take me out of my cell." (JA 5). "You'll see." Leathers said. "Just put your hands through the door, punk." (JA 5).

When the door opened, Leathers stepped so close to Miller that the two men's stomachs may have touched. (JA 181). Leathers, without a superior officer present, ordered Miller to

go downstairs.[3] (JA 181). However, Leathers blocked his path by stepping in front of him which threatened Miller. (JA 181-183). Miller, handcuffed and unable to defend himself, told Leathers to "go ahead" and hit him. (JA 182).

When Leathers finally allowed Miller to pass, Miller hesitated at the top of the stairs. (JA 185). Miller was "paranoid to [go down the stairs], especially in front of [Leathers]. . ." (JA 185). Near the bottom of the stairs, after the two men exchanged more words, Leathers hit Miller in the back with a "rather solid, but not overly painful" blow. (JA 185-186).

Miller interpreted this jab in the back as Leathers' attempt to "start something", and tried to ignore the provocation. (JA 186). At the bottom of the stairs, Leathers hit Miller with the baton again, so hard, that Miller had to do "a little footwork" to keep his balance. (JA 186, 202).

After the second jab with the stick, Leathers ordered Miller to move through the sally port door which was blocked by a food cart. (JA 188). Unable to move forward as ordered, Miller turned around and said "something about [Leathers'] mother". (JA 188). Leathers swung his stick at Miller, and Miller, raising his arms to protect his head, caught the baton between his handcuffs. (JA 188). Miller laughed and told Leathers that his mother or sister could probably hit harder. (JA 188). Leathers

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[3] North Carolina prison regulation NCAC 2F 1502(c)(5)(B) requires that whenever correctional staff removes an inmate from his cell due to the fact that the inmate is causing a disruption, a superior officer must be present.

swung again, and Miller either caught this second blow in the cuffs, or took a hit to his elbow. (JA 215).

Leathers' third swing of the baton struck Miller's lower arm, breaking the bone. (JA 188, 251). Miller told Leathers, "You done broke my arm." Leathers responded, "I'm going to kill you." (JA 219).

Sergeant Walker and Officer Monk arrived. (JA 222-225). Miller claimed that Sergeant Walker told Leathers that he had no business pulling Miller out of his cell. (JA 7). Walker stated in his deposition that "it would have been better not" to have removed Miller from his cell at that time. (JA 104).

Officer Monk escorted Miller to the infirmary. A physician's assistant determined that Miller had been struck on his right wrist and elbow with a baton. (JA 251). An X-ray revealed a fracture of the distal shaft of the right ulna. (JA 251). A short arm cast was applied on January 12, 1987 and removed on March 16, 1987. X-rays showed satisfactory healing. (JA 252).

The district court granted summary judgment to petitioner, concluding, inter alia, that the use of force was reasonable, justified and applied in a good faith effort to discipline Miller. Pet. App. at A-5. A divided panel of the Court of Appeals affirmed. The en banc court reversed the decision. The court, using the standard enunciated in Whitley v. Albers, 475 U.S. 312 (1986), concluded:

> Accepting Miller's version as true, we find that it supports a 'reliable inference of wantonness in the

> infliction of pain'. [citation omitted]. Verbal provocation alone does not justify a response such as occurred in this case, and whether there was any more than verbal provocation by Miller is in genuine issue on any fair reading of this record.

Pet. App. at A-7.

REASONS WHY THE PETITION SHOULD BE DENIED

THE STANDARDS OF REVIEW EMPLOYED BY THE COURT BELOW ARE FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS REGARDING SUMMARY JUDGMENT.

Petitioner contends that the court's reliance on Charbonnages de France v. Smith, 597 F.2d 406 (4th Cir. 1979), for a single proposition[4] illustrates that "in evaluating the summary judgment record, [the court below] employed a standard of review which had previously been superseded by rulings of this Court". Pet. at 10. Petitioner further claims that Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), create a more demanding standard for surviving a motion for summary judgment under Rule 56 than the

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[4] The court below relied on Charbonnages for the proposition:

> The facts and inferences to be drawn from the facts must be viewed in the light most favorable to the non-moving party, and this party is entitled "to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, and all internal conflicts in it resolved favorably to him".

Pet. App. at A-3 (quoting Charbonnages, 597 F.2d at 414).

court below applied in reaching its decision. Pet. at 11. These characterizations, designed to make this case appear worthy of review, are incorrect.

In 1986, this Court decided a trilogy of summary judgment cases: Celotex Corp. v. Catrett, 477 U.S. 317; Anderson v. Liberty Lobby, Inc., 477 U.S. 242; and Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574 (1986). In large part, these cases are not pertinent to this one. In Celotex, the issue was whether the moving party's failure to support its motion for summary judgment with evidence tending to negate the non-moving party's claim precluded the entry of summary judgment in its favor. 477 U.S. at 319. This Court found "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim". Id. at 323.

Anderson presented "the question whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which New York Times applies". 477 U.S. at 244 (New York Times Co. v. Sullivan, 376 U.S. 254, 285-286 (1964), held that in a libel suit brought by a public official, the First Amendment requires the plaintiff to show with "convincing clarity" that the defendant acted with actual malice). This Court held that "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that

apply to the case". Id. at 255.

Finally, in Matsushita, this Court considered the proper standards for deciding summary judgment motions for claims under Section 1 of the Sherman Act. 475 U.S. at 588. It held, "To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of Section 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." Id. (citing Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984)). This Court explained that "the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a genuine issue for trial exists within the meaning of Rule 56(e)". Id. at 596. It also concluded, "Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence; if [defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." Id. at 596-597.

These three cases retained the principle for which the Fourth Circuit cited its own precedent: "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159 (1970)); Matsushita, 475 U.S. at 587-588 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). Further, these cases reaffirmed long established principles regarding summary judgment: the genuine

issue of material fact "is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial". 477 U.S. at 249 (quoting First Nat'l Bank of Ariz. v. Cities Service Co., 391 U.S. 253, 288-289 (1968)). Therefore, on motion for summary judgment, the judge determines "whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not". 477 U.S. at 254.

Thus, whether Charbonnages or this Court's authority is cited, the court below applied the correct test when it decided the summary judgment issue. The court concluded, "Miller's version of the incident supports a reasonable inference that Leathers intended to provoke an incident so as to allow Leathers to beat him under the guise of maintaining order or defending himself." Pet. App. at A-5-6. The court reasoned, "The grievance filed by Miller indicates that Leathers may have harbored ill will against him." Pet. App. at A-6. In addition, the court explained, "Leathers' removal of Miller was apparently effected in violation of [a North Carolina prison] regulation, and this undisputed fact further supports an inference that Leathers intended to retaliate against Miller." Id. Further, the court stated, "While [Leather's] arguments may eventually prevail at a later stage of the proceedings, they are inadequate to overcome

the genuine issues of material fact raised by Miller's statements." Id. Hence, the court held, "Accepting Miller's version as true, we find that it supports a 'reliable inference of wantonness in the infliction of pain.'" Pet. App. at A-7. Since the court below used the correct summary judgment standard, no conflict exists with the decisions of this Court.

THE COURT BELOW APPLIED THE EIGHTH AMENDMENT STANDARD ANNOUNCED BY THIS COURT IN WHITLEY V. ALBERS AND DETERMINED THAT PETITIONER WAS NOT ENTITLED TO SUMMARY JUDGMENT UNDER THAT STANDARD. CONSEQUENTLY, THIS CASE DOES NOT PRESENT THE COURT WITH THE QUESTION OF WHETHER WHITLEY IS THE CONTROLLING TEST IN CASES OF INDIVIDUAL INSURGENCY OR INSUBORDINATION BY INMATES.

To be successful, prisoners claiming Eighth Amendment violations must "allege and prove the unnecessary and wanton infliction of pain". Whitley v. Albers, 475 U.S. 312, 320 (1986). This standard is determined in light of "differences in the kind of conduct against which an Eighth Amendment objection is lodged". Id.

In Whitley, a "malicious and sadistic" standard was used to review the shooting of an inmate during a prison riot in which a guard had been taken hostage:

> Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very

purpose of causing harm".[5] 475 U.S. at 320, 321 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)).

While both petitioner and the dissent below contend that Whitley was not applied by the en banc majority, these contentions are not supportable. The majority opinion explicitly states, "To determine whether the pain inflicted was unnecessary and wanton, a court should consider 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" Pet. App. at A-3 (quoting Whitley, 475 U.S. at 320-21).

The true issue presented by this case is factual, not legal. Petitioner and the dissent question whether petitioner's conduct was sadistic and malicious. This fact-bound issue is not worthy of this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925); Texas v. Mead, 465 U.S. 1041 (1984)(Stevens, J.). Further, the facts alleged are clearly sufficient to prove the sadistic and malicious infliction of pain. According to Miller, he filed a grievance against Leathers, complaining that Leathers told another inmate that Miller was a "snitch". (JA 230). Leathers delivered the grievance, decided in his favor, to Miller for his signature. (JA

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[5] A "deliberate indifference" Eighth Amendment standard is applied in cases where the State's responsibility to provide medical care to the prisoners is the basis for the constitutional claim. See Estelle v. Gamble, 429 U.S. 97, 104 (1976)("deliberate indifference" to a prisoner's serious medical needs constitutes cruel and unusual punishment forbidden by the Eighth Amendment).

230). After an exchange of insults and threats, (JA 5, 147-153, 167-168), Leathers decided to take Miller out of his cell. Despite North Carolina prison regulations requiring a supervisor's presence when a disruptive inmate is removed from his cell, he handcuffed Miller and removed him in the absence of any superior official.[6] (JA 181-185). After more verbal sparring, Leathers swung his riot baton at Miller, who raised his handcuffed hands to protect his head. (JA 188). Miller laughed at the ineffectiveness of this blow, (JA 188), and Leathers struck twice more. The final blow broke Miller's wrist. (JA 188, 215).

Miller's version clearly establishes that Leathers retaliated against Miller's insults by maliciously and sadistically beating him. The petitioner essentially asks the Court to conclude that respondent's racial provocation should control the Whitley analysis. Pet. at 11-12. The majority opinion correctly recognized that verbal provocation alone "does not justify a response such as occurred in this case, and whether there was any more than verbal provocation by Miller is in genuine issue on any fair reading of this record". Pet. App. at

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[6] See NCAC 2F 1502(c)(5)(B). Petitioner responds to this regulation by arguing that Miller was not disruptive at the time Leathers removed him from the cell, and the purpose for removing him was to escort him to a higher authority for an as of yet unexplained purpose. (Pet. at 8, n.4) Petitioner's version at most presents a genuine issue of material fact which must be resolved by a jury and not on motion for summary judgment. A jury must decide if this prison regulation was breached, thereby raising a strong inference that Leathers removed Miller from his cell to beat him and did not want any witnesses present.

A-7. Petitioner's claim that verbal insults authorize a prison guard to administer summary corporal punishment against prisoners has no support in this Court's decision in Whitley or elsewhere.

THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER CIRCUITS REGARDING THE CORRECT EIGHTH AMENDMENT STANDARD TO BE APPLIED WHEN INMATES ARE INJURED BY PRISON GUARDS.

Petitioner also claims that this case is worthy of this Court's plenary review because the circuits are split regarding the application of Whitley's "sadistic and malicious" standard to disciplinary disturbances which fall short of a full-blown prison riot. Pet. at 12.

Whether any split in the circuits even exists is questionable. Petitioner correctly cites cases from the Fifth and Eleventh Circuits which apply Whitley in non-riot situations. Huguet v. Barnett, 900 F.2d 838 (5th Cir. 1990); Bennett v. Parker, 898 F.2d 1530 (11th Cir. 1990); Ort v. White, 813 F.2d 318 (11th Cir. 1987); Brown v. Smith, 813 F.2d 1187 (11th Cir. 1987).

The decision below is not in conflict with these decisions and neither is Corselli v. Coughlin, 842 F.2d 23 (2d Cir. 1988), which petitioner also relies on to create a conflict. After distinguishing Whitley because the incident in Corselli was not a full-scale riot as presented in Whitley, the Second Circuit applied Whitley's "sadistic and malicious" standard to decide that case. Corselli, 842 F.2d at 26. Corselli, then, is fully consistent with the cases from the Fifth and Eleventh Circuits

cited by the petitioner.

An intra-circuit conflict in the Second Circuit may exist, although petitioner does not cite it. Stubbs v. Dudley, 849 F.2d 83 (2d Cir. 1988), cert. denied, 489 U.S. 1034 (1989), does apply the "deliberate indifference" standard in a case involving a non-riot prison disturbance where security concerns were implicated. However, the dissent from the denial of certiorari in that case, identified Corselli as conflicting with Stubbs because Corselli applies Whitley in a non-riot situation. 489 U.S. at 1038.

More importantly, the Stubbs dissent from the denial of certiorari further noted that "no other Court of Appeals has interpreted Whitley as limited to 'full-blown prison riots'". Id. The Fourth Circuit opinion here clearly joins those other circuits that apply Whitley in non-riot situations. Thus, to whatever extent a conflict exists in the Second Circuit, it is not an issue presented in this case because the applicability of the Whitley standard is not in dispute.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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